IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 194 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

M/s.G. K. CHOKSI & CO.
Versus
COMMISSIONER OF INCOME-TAX

Appearance:
1. INCOME TAX REFERENCE No. 194 of 1986
MR RK PATEL for Applicant.
MR AKIL QURESHI FOR MR MANISH R BHATT
for Respondent.

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision:16/08/2001

JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following question under section 256(1) of the Income Tax Act,1961 (hereinafter referred to as 'the Act').

"Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the assessee was not entitled to deduction u/s.32(1)(iv) of the Act?"

2 The assessee is a firm of Chartered Accountants having its offices at Ahmedabad, Petlad and Nadiad. The assessment year is 1984-85 and the relevant accounting period is financial year ending on 31/3/1984. The assessee made a claim in respect of initial depreciation under section 32(1)(iv) of the Act on the cost of building erected during the year at Petlad. The said claim was negatived by the Income Tax Officer as according to him the said provision was meant to apply only in case of assessees who carried on business and not in the case of assessees who are involved in 'profession'. The assessee challenged the assessment order and the C.I.T.(Appeals) relying upon the decision of Supreme Court in the case of Barendra Prasad Ray and others Vs.Income Tax Officer, 129 I.T.R.295 accepted the claim of the assessee and directed the Income Tax Officer to grant initial depreciation at 40% in respect of building erected by the assessee.

3 The revenue went in appeal before the Tribunal and the Tribunal came to the conclusion that the assessee was not entitled to the relief claimed by it. According to the Tribunal the decision of the Supreme Court in the case of Barendra Prasad Ray (supra) was rendered on the particular facts of the case and it was restricted to the situation prevailing therein. It was further observed by the Tribunal that the said decision of the Supreme Court was not meant to be applied to every case irrespective of the facts. The Tribunal also took note of the difference between provisions of section 32(1) of the Act and section 32(1)(iv) of the Act and held that wherever legislature intended to give particular relief to an assessee carrying on 'profession' it was specifically provided in the statute and where the scope of the deduction was to be restricted to 'business' only the word 'profession' was omitted.

4 Mr.R.K.Patel, learned Advocate assailed the order

of the Tribunal by referring to the opening portion of section 32(1) of the Act, wherein the legislature has specifically used the expression 'business or profession' and contended that sub-clause (iv) was to be governed by the opening portion of the section and further that it was not necessary for the legislature to repeat both the words in each and every clause, the legislature having used both the words in the beginning of the section. It was further contended that the definition of both the terms viz. 'business' in section 2(13) of the Act and 'profession' in section 2(36) of the Act are inclusive definition, that opening portion of section 2 which deals with definitions reads "in this Act, unless the context otherwise requires, -" and hence according to him the terms will have to be read as interchangeable or at least one term carrying within its fold other term also if the context so required.

5 Thereafter, our attention was drawn to Circular No.202 dated 5/7/1976 issued by the Central Board of Direct Taxes by way of Explanatory Note on provisions relating to Direct Taxes as amended by the Finance Act,1976, to point out that the said circular while dealing with the amendment in section 32(1)(iv) of the Act has used the word 'Tax Payer' in para 21.1 of the said circular. Thus according to the Counsel for the assessee legislative intent was very clear in as much as the term 'business' used in section 32(1)(iv) of the Act also included 'profession'; that the assessee should be held to be entitled to the relief accordingly.

6 Mr.Patel further referred to Supreme Court decision in the case of C.I.T. vs. J.H.GOTLA, 156 I.T.R.323 and urged that where the plain literal interpretation of statutory provision produces a manifestly unjust result it was open to the Court to modify language so as to achieve the intention of the legislature and produce a rational result. He further relied on another Apex Court decision in the case of C.I.T. vs. J.K.HOSIERY FACTORY, 159 I.T.R.85 and submitted that where two interpretations are possible the Court should adopt an interpretation which is favourable to an assessee bearing in mind that a taxing statute is being construed.

7. Mr.Akil Qureshi, learned Counsel for the Revenue in support of the Tribunal's order contended that the definition of both the terms 'business' and 'profession' though worded to be inclusive have to be given their independent meanings and eventhough the term 'business' is very wide, the same has to be read as excluding

'profession' in light of the separate definitions. Referring to the provision of section 32 it was pointed out that various clauses show that the legislature intended the application of only certain clauses to both 'business' and 'profession' while some of the clauses were applicable only to 'business'. It was pointed out that clause (i) referred to a case of ships, clause (ii) referred to a case of buildings, machinery, plant or furniture, clause (iia) referred to new machinery or plant installed after the specified date, clause (iii) referred again to building, machinery, plant or furniture which is sold, discarded etc., and in none of the aforesaid clauses is it specified as to whether it is applicable to 'business' or 'profession' and hence what is stated in sub-section (1) of section 32 will be applicable i.e. the relief specified in each of the clauses would be available either to a 'business' or 'profession' as the case may be on the requisite conditions being fulfilled. Mr.Qureshi pointed out that on the other hand on reading clause (iv) it is found that only word 'business' is used; similarly in clause (v) it is the case of new building owned by an Indian company and used as a hotel, which by its very nature would not be applicable in the case of 'professional'; similarly clause (vi) is a case of 'new ship' or 'new aricraft' and used for the purpose of business of operation of ships or aircraft, or case of new machinery or plant installed after the specified date and used for various businesses specified therein, and thus the legislative intent, it was submitted, was clear that these clauses would not apply to 'profession' by the very nature of activities specified in those clauses.

8. Our attention was drawn to section 32(1A) of the Act to point out that when legislature envisages that the provision should apply to both 'business' and 'profession'it was specific; where it wanted to segregate. Legislature had specifically used one or other term in the mentioned clause.

9. Referring to part 'D' which deals with Profits and Gains of Business or Profession, our attention was drawn to section 28 which specifies incomes falling under the head profits and gains of business or profession. Section 29 lays down as to how the income referred to in section 28 shall be computed in accordance with the provisions as contained in sections 30 and 43A. It was next pointed out that sections 30 and 31 of the Act referred to both 'business' and 'profession' while sections 32A, 33, 33A and 33B of the Act are applicable only in case of businesses. Thereafter, referring to

provision of section 38 of the Act, it was pointed out that sub-section (1) deals with the situation which was applicable in both the cases viz. for 'business' or 'profession'; referring to sub-section (2) of section 38 it was pointed out that the said provision would apply to both 'business' and 'profession' but as can be seen from the language used therein only those clauses of section 32(1) of the Act were mentioned which deal with both 'business' or 'profession' and clauses (iv), (v) and (vi) of section 32(1) were absent indicating that the legislature was aware of the situation that the said three clauses apply only in case of 'business' and if the legislative intent was clear it was not open to the Court to take a different view of the matter.

10. Mr.Qureshi further submitted that both the terms had separate meanings assigned to them in the definition section and while computing income under the head profits and gains of business or profession the scheme of the Act envisages that a particular provision would apply to one or the other while another provision would apply to both. It was further submitted that if section 32(1)(iv) of the Act could operate independently of the opening portion of section 32(1) it was not necessary to import word 'profession' into the said clause as there was no warrant in statute for doing so.

11. Referring to the Supreme Court decision in the case of Barendra Prasad Ray (supra) it was pointed out that the Supreme Court was dealing with a situation arising under section 9 of the Act which operated in entirely different field, while section 32 had a surrounding set of sections, sub-sections and clauses which would enable one to arrive at an interpretation that the term 'business' did not include within its sweep the term 'profession'. That the Supreme Court in the aforesaid case was called upon to interpret the term 'business connection' which is different and distinct from the term 'business' and hence, the said decision cannot help the case of the assessee.

12. Mr.Qureshi, learned Advocate referred to a case of C.I.T. vs. Lallubhai Nagardas & Sons, 204 I.T.R.93 (Bom.), wherein the question was whether Stock Brooking was a profession. Relying upon the same it was urged that when the two terms have been given different meanings which are to the exclusion of one another it would not be possible to adopt the meaning of one as including the other. Relying upon the case of Modipon Ltd. vs. C.I.T. 247 I.T.R.40 (Delhi), it was urged that the Court while interpreting taxing statute should

adopt strict interpretation, and further that it was not open to the Court to read more than what was written in the provision. For the said purpose reliance was placed on the Supreme Court decision in the case of Controller of Estate Duty vs. Kantilal Trikamlal, 105 ITR 92 (at page 97 of the said report).

13. Definition or interpretation clause which defines the meaning of a word should not be construed as taking away its ordinary meaning. Further, such a clause should be so interpreted as not to destroy the basic concept or essential meaning of the expression defined, unless there are compelling words to the contrary. Words used in the sections of the Act are presumed to have been used correctly and exactly as defined in the Act, and it is for those who assert the contrary to show that there is something repugnant in the subject or context. Words which are not specifically defined must be taken in their legal sense or their dictionary meaning or their popular or commercial sense as distinct from their scientific or technical meaning, unless a contrary intention appears or their meaning may depend upon the context in which they are used. The same word occurring more than once in the Act should generally be given the same meaning, but the context may indicate the contrary legislative intention. This is the essence of the rules of interpretation in relation to definition clause in a statute.

14. Testing the case of the assessee at the anvil of the aforesaid rules of statutory interpretation we may now examine the contention canvassed before us. Mr.Patel for the assessee very emphatically and repeatedly stressed that the interpretation that should be put on clause (iv) of sub-section (1) of section 32 of the Act should not deprive an assessee who is engaged in a profession from the relief which the legislature has provided for in the said provision. That the definition of terms 'business' and 'profession' are not restrictive and the Court should not read in that context. It was urged that if a restrictive meaning is read into term 'business' in clause (iv) of section 32(1) of the Act, it would result in unjust discrimination in relation to those classes of employees who are employed by a professional, that the entire class of employees would get fragmented into those employed by a professional and those employed by businessman and such intention should not be ascribed to the legislature.

15. It is well settled that even amongst one category of persons it is open to the legislature to prescribe rational classification based on intelligible nexus.

Therefore, if the legislature has classified a group of persons employed by a professional into one class and another class comprised of group of employees employed by a businessman it would not be correct to hold that the same would result in any unjust discrimination.

16. We may take into consideration the relevant provisions which we are called upon to interpret and decide the question raised before us :

"Depreciation.

32.(1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed -

xxx xxx xxx

(iv) in the case of any building which has been newly erected after the 31st day of March,1961, where the building is used solely for the purpose of residence of persons employed in the business and [the income of each such person chargeable under the head "Salaries" is [ten thousand] rupees or less], or where the building is used solely or mainly for the welfare of such persons as a hospital, creche, school, canteen, library, recretional centre, shelter, rest-room or lunch-room, a sum equal to [forty] per cent of the actual cost of the building to the assessee in respect of the previous year of erection of the building".

17. On reading the provisions we find that section 32(1) stipulates that on buildings machinery, plant or furniture which is owned by an assessee and used for the purposes of business or profession depreciation shall be available by way of deduction. However, sub-section (1) of section 32 uses the phrase "the following deductions shall" and therefore it is apparent that the said sub-section is laying down general conditions or basic requirements, on fulfillment of which, an assessee shall become eligible for deductions as provided in the various

clauses which follow. Thereafter, as can be seen from the scheme of the section various clauses would operate on further specific conditions laid down in each such individual clause. Clause (i) deals with case of ships other than ships ordinarily plying on inland waters, clause (ii) pertains to buildings, machinery, plant or furniture, other than ships. Similarly clause (iia) deals with new machinery or plant installed within period specified in the said clause etc. Now, as can be seen from clause (i) read in juxtaposition with the opening portion of section 32(1), the clause deals with ships but in sub-section (1) opening portion speaks of buildings, machinery, plant or furniture and the reference to ships is absent. Can it then be contended that no deduction for depreciation is allowable because section 32(1) does not provide for ships in the opening portion ? Answer is obviously "No". This is just an illustration of the scheme or the framework in which the section operates. It is, therefore, not possible to accept the contentions raised on behalf of the assessee that the opening portion of section 32(1) would govern the operation of the various clauses which follow : and in case of each clause a deduction would be available against income from business or profession. On close reading of the entire scheme it is apparent that the legislature has used both the terms "business" and "profession" as having distinct meaning and operating in specified situation for the purpose of computing income specified in section 28 in the manner laid down in section 29 of the Act.

18. Clause (iv) states that any building which has been newly erected after 31/3/1961 shall become eligible for a deduction for initial depreciation at the sum equal to 40% of the actual cost of the building in the year of erection subject to the specified user. Now in so far as the use of the building is concerned we find that there are two limbs which provide for (i) the mode of user, (ii) the persons for whom the building is to be used and (iii) nature of user. The first limb provides that the building has to be used solely for residence of persons employed in the business and the income of such person chargeable under the head 'Salaries' is to be Rs.10,000/or less. The second limb provides that building may be used solely or mainly for the welfare of such persons (namely those specified in the first limb) and the nature of use has to be as a hospital, creche, school, canteen, library, recreational centre, shelter, rest-room or lunch-room. Thus, it can be seen that the building which has been erected after 31/3/1961 has to be used for either residence or welfare as specified, of persons employed in the business.

19. The submission that the word 'business' should mean to include the term 'profession' and the benefit should be available to an assessee who employs such persons in profession cannot be accepted because the second limb of clause (iv) is an inherent indicator that the deduction is available only in relation to an assessee carrying on business. The second limb of the clause provides for nature of various uses which are meant for the welfare of low paid employees. Making provision for Creches is specifically laid down in section 48 of the Factories Act,1948 which further stipulates that an employer shall provide a Creche when it employs 30 women in its work force. Similarly provision for Canteen is found in section 46 of the Factories Act,1948 and the stipulation is a factory wherein more than 250 or more workmen are employed. Similar is the situation in relation to provision for Shelter, Rest-room or Lunch-room in section 47 of the Factories Act,1948 and the stipulation is employment of 150 or more workers. A professional cannot claim that he would be governed by the Factories Act,1948. Therefore, in case the second limb of the same cluase cannot be applied in case of an assessee carrying on profession it would not be possible to read the term 'business' so as to include 'profession' only for the purpose of application of the first limb of the same clause. It is not possible for the Court to adopt an interpretation which would render one portion of the same clause otiose for the purpose of holding that the relief would be available to one class of assesses under another portion of the same clause. In fact, language used in clause (iv) is so interwoven that it is not possible to interpret the provision in such a manner as the assessee would like the Court to adopt.

20. Another angle from which the matter can be examined is that the entire part 'D' deals with profits and gains of business or profession and right from sections 28 to 43A of the Act, we find that though the phrase has been used in certain sections as 'business' or 'profession' nowhere has the phrase been used as 'business' and 'profession'. Infact, as can be seen, wherever the legislature intended that a benefit of a particular provision should be available to both 'business' or 'profession' it has used the phrase 'business' or 'profession', or after using the said phrase in the opening portion of the section not specified in relation to each individual sub-section or clause where the benefit of deduction is available to both categories of assesses.

21. Furthermore, provisions of section 36 of the Act provide for an almost identical situation wherein we find that sub-section (1) of section 36 of the Act states that the deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein in computing income referred to in section 28, thus making it clear that it is in relation to computation of profits and gains of business or profession. Clauses (i), (ii), (iia), (iii), (iv), (v) and (vi) of section 36(1) of the Act specifically provide for deduction for the purposes of both 'business' or 'profession', while clauses (ia), (viia), (viii), (viiia) and (ix) specifically deal only with situation where the prescribed deduction would be available to an assessee carrying on the specified business. Therefore, the legislature is aware and has specifically provided for some of the deductions under one or the other heading only and if that be so, it would not be open to the court to rewrite the provision so as to enable an assessee carrying on the other activity to seek relief which is otherwise not provided for.

22. The Supreme Court decision in the case of Barendra Prasad Ray and others (supra) appears at first blush to support the case canvassed by the assessee. However, the said decision shall have to be read in light of what is laid down by the Apex Court in the case of C.I.T. Vs. Sun Engineering Works Pvt.Ltd.,198 I.T.R.297, wherein the Hon'ble Court has cautioned against reading its own judgment in a truncated manner. It is stated "

> "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes it colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the

questions under consideration by this Court, to support their reasonings. In Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9; AIR 1971 SC 530, this Court cautioned (at page 578 of AIR 1971 SC) :

It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

23. Therefore, we may examine the controversy which the Supreme Court was called upon to decide and the factual matrix in which the decision was rendered so as to ascertain whether the said decision can come to the aid of the assessee before us. The appellants before the Supreme Court were partners of a Firm of Solicitors who were acting as Solicitors for a German Corporation. It appears that two cross suits were filed on the original side in the Calcutta High Court for alleged infringement of a patent. The appellants were instructed by a Firm of Solicitors in London who also were acting for the German Corporation. The London solicitors instructed the appellants to retain Mr.Blanco White, a resident of the U.K. for representing German Corporation in the suits before the High Court. When Mr.Blanco White arrived in India he was retained by the appellant as a Counsel but no briefs were delivered to him and the appellant neither undertook to pay nor paid any fees for the services rendered by Mr.Blanco White. The briefs had already been delivered by the London Firm of Solicitors. On the basis of these facts the Income Tax Officer treated the appellant as an Agent of Mr.Blanco White and assessed the appellant accordingly. This assessment was challenged by way of petition before the learned Single Judge of the Calcutta High Court who dismissed the petition. Appeal before the Division Bench of the High Court also failed and the Supreme Court was called upon in the appeal to decide whether the appellant could be said to be an Agent of Mr.Blanco White for the purpose of ascertainment of tax liability of Mr.Blanco White in relation to his appearing and conducting the matter before the High Court. The appellant's basic contention was that section 9(1) of the Act (as it then stood) provided that all income accruing or arising whether directly or indirectly through or from any business connection in India, shall be deemed to accrue or arise in India. That as the

appellant had no business connection with Mr.Blanco White they were not liable to be treated as an Agent of Mr.Blanco White for the purpose of ascertaining the tax liability of Mr.Blanco White. Thrust of the contention on behalf of the appellant was that the term 'business connection' did not include within its sweep 'professional connection'.

24. In the reported decision in 129 I.T.R.295 we find that the facts have been narrated upto pages 303 and on the same page provisions of section 160(1)(i) read with section 161(1) and section 163 of the Act, for purposes of agent's liability have been dealt with and after summarising the facts the Supreme Court has held that as Mr.Blanco White could appear only with the consent of the appellants who are Solicitors on record there was connection between the appellant and Mr.Blanco White. Thereafter, the Court goes on to examine whether such a connection was 'business connection'. After referring to the definition of the term 'business' and 'profession' the Apex Court has dealt with the Scheme of the Act commencing from section 14 onwards which enumerates the heads of income and after referring to sections 28 to 44B of the Act states that - "Sections 28 to 44B of the Act constitute the fascicule of provisions dealing generally with the computation of income from business and profession although not all those provisions are applicable to income from a profession". (Emphasis supplied). The Court then goes on to observe the phrase 'business connection' has not been defined. It is further stated that though there is specific reference to 'business' in section 9(1) and there is no reference to 'profession', no tenable reason is discernible from the statute for excluding income arising out of profession from its scope. While dealing with the submission made on behalf of the appellant to the effect that it was the intention of Parliament to exclude non-residents engaged in learned profession from the operation of section 9(1) it is held:

> " xxx xxx We do not find that there is any substance in the first submission. There could be no good reason for Parliament for excluding non-resident professional men from the purview of s.9(1) of the Act. There is no material on which we can reach that conclusion ..."

25. The second submission on behalf of the appellant

was that since the term profession was not expressly used the Court should not fill-up the lacuna so as to include the same within the term "business connection". The Court has thereafter come to the conclusion that infact there was no lacuna in the section and the interpretation placed by the Court did not really amount to filling up lacuna. It was observed - " We are of the view that in the context in which the expression "business connection" is used in s.9(1) of the Act, there is no warrant for giving a restricted meaning to it excluding 'professional connections' from its scope".

26. Therefore, in our opinion, the decision in the case of Barendra Prasad Ray and Others (supra) was rendered on the peculiar facts and it is not possible for us to hold that while interpreting clause (iv) of section 32(1) of the Act, there is no tenable reason discernible from the statute for excluding the term "profession" from the expression "business". As we have already seen hereinbefore the Scheme of the Act specifically envisages availability of deductions to one or the other or to both depending upon the nature of activity carried on subject to fulfillment of prescribed conditions. It is also not possible for us to hold that there is no good reason for Parliament for excluding an assessee carrying on 'profession' from the expression 'business'.Similarly, the context in which the word 'business' is used in section 32(1)(iv) of the Act only restricted meaning excluding 'profession' from its scope can be given and there is no warrant for not excluding 'profession' from the term 'business'. It is also not possible to state that a strict and literal construction of the statute leads to an absurd result. In fact, if any other interpretation is adopted it would result in a situation not intended to subserve the object of the legislature ascertained from the scheme. It is also not possible for the Court to hold that the plain literal interpretation of the statutory provision would produce a manifestly unjust result and hence it is not open to us to modify the language as urged on behalf of the assessee. As already stated the legislature has consciously classified the assessees into different categories depending upon the nature of activities undertaken by such assessees and it cannot be held that such classification is either arbitrary or is one which results into unjust discrimination. We were also called upon to interpret the provision in a harmonious manner so as to give full effect to the legislative intention of granting relief by way of initial depreciation and it was urged that if the legislature has failed to clarify the meaning by use of

the appropriate language the benefit thereof must go to the tax payers. There can be no quarrel with the aforesaid rule of interpretation but it is equally well settled that the Court in interpreting the taxing statute will not be justified in adding words thereto so as to make out some presumed object of the legislature.

27. Infact we are not called upon to deal with a situation where definition clause which defines the meaning of a word would be construed so as to take away its ordinary meaning. The expression 'business' as defined in section 2(13) of the Act though inclusive one cannot be extended to include 'profession' when the latter term is separately defined in section 2(36) of the Act. We are not faced with a situation where there would be compelling words in the surrounding provision which would require us to adopt a meaning to the contrary and there is nothing repugnant in the subject or the context for us to hold that the term 'business' used in section 32(1)(iv) of the Act, is not used correctly or exactly as defined in the Act. Similarly, we do not find that there is any contrary intention of the legislature depending upon the context in which the said term is used because the same word ocurrs at more than one place in the Act and the phrase "unless context otherwise requires" cannot be brought into play as we do not find any contrary legislative intention in the provision.

28. We, therefore, hold that the Tribunal was right in law in holding that the assessee was not entitled to deduction under section 32(1)(iv) of the Act on the facts and circumstances of the case. The question referred to us is therefore answered in the affirmative i.e. in favour of the revenue and against the assessee with no order as to costs. Reference stands disposed of accordingly.

Sd/- Sd/-
(A.R.Dave, J) (D.A.Mehta, J)

m.m.bhatt